88-1929

NO.

MAY 3 1989

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

TIMOTHY WASHABAUGH

PETITIONER

-V-

COMMONWEALTH OF KENTUCKY

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

C. THOMAS HECTUS
2442 Ransdell Avenue
Louisville, KY 40204
Phone: (502) 454-3836

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THIS COURT SHOULD HOLD THAT DUE PROCESS AS REQUIRED BY THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION REQUIRES EITHER THAT THE TRIAL COURT DEFINE THE TERM "REASONABLE DOUBT" AS USED IN THE CONTEXT OF A CRIMINAL TRIAL, OR ALTERNATIVELY, THAT DEFENSE COUNSEL MUST BE ALLOWED TO ARGUE THE MEANING OF "REASONABLE DOUBT" TO THE JURY?

PARTIES IN THE COURT BELOW

The parties in the Supreme Court of Kentucky were the Appellants, Timothy and Nancy Washabaugh, and the Appellee, Commonwealth of Kentucky. Nancy Washabaugh's conviction was affirmed by the Supreme Court of Kentucky, but she is not a Petitioner in this Court.

TABLE OF CONTENTS

ITEM	PAGE
Question Presented.....	i
Table of Contents.....	ii
Table of Authorities.....	iii
Opinion Below.....	1
Jurisdiction.....	1
Constitutional Provisions Involved.....	2
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE WRIT:	
THE PROCEDURAL RULES PROMULGATED BY THE SUPREME COURT OF KENTUCKY WHICH PROHIBIT THE TRIAL COURT FROM DEFINING "REASONABLE DOUBT" IN ITS INSTRUCTIONS TO THE JURY, AND WHICH ALSO PREVENT DEFENSE COUNSEL FROM ARGUING THE MEANING OF REASONABLE DOUBT, DO NOT COMPORT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.	
CONCLUSION.....	13
CERTIFICATE OF SERVICE.....	14
APPENDIX	

TABLE OF AUTHORITIES

PAGE

CASES

Commonwealth v. Callahan, Ky., 675 S.W.2d 391 (1984)..... 9

In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 1072-1073, 25 L.Ed.2d 368 (1970)..... 6, 9

Kentucky v. Whorton, 441 U.S. 786, 99 S.Ct. 2088, 60 L.Ed.2d 640 (1979).. 12

Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978).. 5, 10

Thomas v. Arn, 704 F.2d 865, 869, fn. 3 (CA 6, 1983)..... 6

STATUTES

KRS 514.110(2)..... 7

RCr 9.56(2)..... 6

28 U.S.C. §1257(3)..... 1

OTHER AUTHORITIES

Devitt and Blackmar, §§11.14-.15..... 10

Fifth Circuit and Pattern Jury Instruction, Basic Instruction 3A..... 10

F.J.C.R. Instruction 21..... 10

Ninth Circuit Model Jury Instruction 3.04..... 10-11

Petitioner, Timothy Washabaugh, respectfully prays that a Writ of Certiorari issue to review the opinion of the Court of Appeals of Kentucky rendered on July 29, 1988.

OPINION BELOW

The Opinion of the Court of Appeals of Kentucky affirming the judgment of conviction was rendered on July 29, 1988. [Appendix, hereinafter A., pp. 1-17.] The Order of the Supreme Court of Kentucky denying Discretionary Review of the Opinion of the Court of Appeals was entered on March 8, 1989. [A., p. 18.]

JURISDICTION

The Opinion of the Court of Appeals of Kentucky affirming the judgment was rendered on July 29, 1988. No rehearing was sought. The Order of the Supreme Court of Kentucky denying Discretionary Review was entered on March 8, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, which states in pertinent part:

> ... nor shall any State deprive any person of life, liberty, or property, without due process of law ....

STATEMENT OF THE CASE

During the execution of a search warrant authorizing the Lexington (Kentucky) Metro Police Department to search Petitioner's home for stolen video cassette movies, an RCA video camcorder was found in the bedroom closet. The camcorder was not seized at that time. The next day, police received a report of a stolen camcorder which fit the description of the one seen at Petitioner's residence. Based on that information, police obtained and executed another search warrant, and seized the camcorder from Petitioner's home. Petitioner and his wife were subsequently indicted by the Fayette County (Kentucky) Grand Jury for receiving stolen property, i.e., the RCA camcorder.

At trial, the prosecution called David Noel, an employee of a local video store, who testified that he had seen Petitioner in his store on February 4, 1987, the same day an RCA camcorder was stolen from the store. Although he recalled speaking to Petitioner on that date, and even saw Petitioner and his wife leaving the store, he did not see them handling, carrying, or stealing the camcorder in question. However, when he saw a news account of the search of Petitioner's home for stolen video tapes, he called the police and reported the February 4, 1987, theft of the camcorder.

Mark VanBalen, an FBI agent, participated in the searches of Petitioner's residence. He testified that although Petitioner initially denied any knowledge of the camcorder, Petitioner later said that he had purchased the camcorder from a person he would not identify because he did not wish to get anyone in trouble.

Petitioner presented evidence that the camcorder had in fact been purchased at a flea market in Georgetown, Kentucky, and introduced into evidence a receipt which documented the purchase of the camcorder.

At the close of all the evidence, Petitioner requested an instruction defining reasonable doubt. This instruction was refused by the Trial Court.

After deliberating, the jury convicted Petitioner of receiving stolen property, and set his sentence at four (4) years imprisonment.

On July 29, 1988, the Court of Appeals of Kentucky affirmed Petitioner's conviction. On March 8, 1989, the Supreme Court of Kentucky denied Discretionary Review of the decision of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

THE PROCEDURAL RULES PROMULGATED BY THE SUPREME COURT OF KENTUCKY WHICH PROHIBIT THE TRIAL COURT FROM DEFINING "REASONABLE DOUBT" IN ITS INSTRUCTIONS TO THE JURY, AND WHICH ALSO PREVENT DEFENSE COUNSEL FROM ARGUING THE MEANING OF REASONABLE DOUBT, DO NOT COMPORT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Prior to July 1, 1978, the courts of Kentucky instructed criminal juries on the definition of reasonable doubt. Reasonable doubt was defined as "a substantial doubt, a real doubt." On May 30, 1978, this Court decided Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978), which held that Kentucky's trial courts were constitutionally required to instruct the jury on the presumption of innocence. In Taylor, this Court also criticized Kentucky's "truncated discussion of reasonable doubt," characterizing such as "hardly a model of clarity." Id., 98 S.Ct. at 1936. In response to this Court's criticism of Kentucky's reasonable doubt instruction, the Supreme

Court of Kentucky amended Rule of Criminal Procedure 9.56 to prohibit a trial court from attempting at all to define the term "reasonable doubt." (RCr 9.56(2); amended June 8, 1978, effective July 1, 1978; A., p. 19.)

Petitioner contends that Kentucky's response to its previously Spartan instruction on reasonable doubt, i.e. to simply leave the term "to the common understanding of the jury," Thomas v. Arn, 704 F.2d 865, 869, fn. 3 (CA 6, 1983), is inappropriate, ill-advised, and constitutionally inadequate.

It is an elementary principle of constitutional law that the burden is on the government to prove the guilt of an accused beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 1072-1073, 25 L.Ed.2d 368 (1970). In the case at bar, it was critical to Petitioner's defense that the jury have some judicial guidance as to the meaning of the term "reasonable doubt." There was no evidence in this case that Petitioner either

stole the camcorder, or that he knew that the camcorder was stolen. The Commonwealth was simply relying upon his possession of the camcorder on March 27, 1987, some seven (7) weeks after the camcorder had been "recently" stolen on February 4, to support an inference that Petitioner "knew" that the camcorder was in fact stolen. In reviewing the sufficiency of the evidence, the Kentucky Court of Appeals specifically relied upon KRS 514.110(2), which provides that "mere possession" of recently stolen property constitutes prima facie evidence that the possessor knew the property was stolen. (A., p. 20.)

In discussing the Government's burden of proof, this Court has stated that:

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is the prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence-that bed rock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." [Cite omitted.]

* * *

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.... "There is always in litigation a margin of error, representing error and fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value-as a criminal defendant his liberty-this margin of error is reduced as to him by the process of placing on the other party the burden of *** persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the government has borne the burden of *** convincing the factfinder of his guilt.

To this end, the reasonable-doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue."

* * *

> Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt where innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty.
>
> [In Re Winship, supra, 90 S.Ct. at 1072.]

The inability of a trial court in Kentucky to define "reasonable doubt" is exacerbated and unquestionably rendered constitutionally infirm by the further prohibition against trial counsel arguing the meaning of the term. In Commonwealth v. Callahan, Ky., 675 S.W.2d 391 (1984), the Supreme Court of Kentucky deviated from its traditional objective in the form of its instructions, i.e., "to confine the judge's function to the bare essentials and let counsel see to it that the jury clearly

understands what the instructions mean and what they do not mean." Id., at 392 (emphasis added). In spite of this stated objective, the Supreme Court prohibited trial counsel from "fleshing out" the meaning of "reasonable doubt," which was no longer being defined by the trial courts in Kentucky criminal trials. Interestingly, and virtually in the same breath, the Kentucky Supreme Court quoted Taylor, supra, for the proposition that "... arguments of counsel cannot substitute for instructions by the court." While Petitioner wholeheartedly agrees, Petitioner submits that he cannot be denied both instructions and argument!

A more appropriate response by the Kentucky Supreme Court, rather than to prohibit definition of reasonable doubt, would be to model a definition after that given by the federal courts. For example, see Devitt and Blackmar, §§11.14-.15; Fifth Circuit Pattern Jury Instruction, Basic Instruction 3A; F.J.C.R. Instruction 21; Ninth Circuit

Model Jury Instruction 3.04. Additionally, over half of the states approve some instruction on the definition of reasonable doubt.[1] Petitioner submits that he was entitled to such an instruction, and that failure to do so in and of itself violates the Constitution. However, in the event this Court feels that failure to so instruct does not amount to reversible error, per se, then this Court should evaluate the error in the light of the totality of the circumstances, including all the instructions to the jury (all of which were "skeletal" and "Spartan"), the arguments of counsel (particularly the prohibition against defense trial counsel elaborating on the meaning of reasonable doubt), and the lack of overwhelming evidence

---

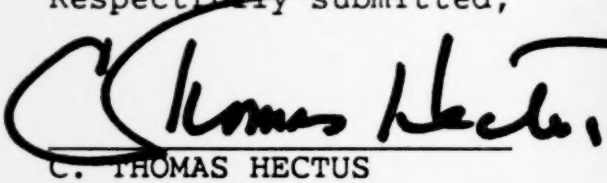
[1] Alabama; California; Delaware; Florida; Georgia; Idaho; Illinois; Indiana; Iowa; Kansas; Louisiana; Maine; Maryland; Michigan; Mississippi; Missouri; Nebraska; New Hampshire; North Carolina; North Dakota; Ohio; Oklahoma; Oregon; Pennsylvania; Rhode Island; Texas; Utah; Vermont; Virginia; West Virginia; Wisconsin; and Wyoming.

against Petitioner to determine whether Defendant received a constitutionally fair trial. See Kentucky v. Whorton, 441 U.S. 786, 99 S.Ct. 2088, 60 L.Ed.2d 640 (1979).

CONCLUSION

Because the jury verdict in this case obviously rested upon a tenuous inference of criminal knowledge based upon Petitioner's possession of so-called "recently" stolen property, it was critical that the Trial Court instruct the jury on the definition of reasonable doubt, particularly in view of the prohibition in Kentucky promulgated by the Kentucky Supreme Court against trial counsel arguing the meaning of reasonable doubt. Accordingly, the Petitioner respectfully requests that this Court grant this Petition, and review the Opinion of the Court of Appeals of Kentucky affirming Petitioner's judgment of conviction.

Respectfully submitted,



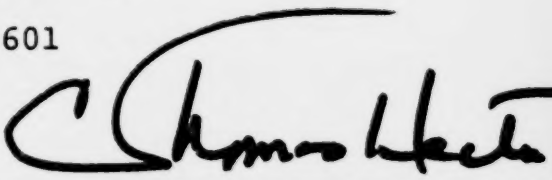
C. THOMAS HECTUS
2442 Ransdell Avenue
Louisville, KY 40204
Phone: (502) 454-3836

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I, C. Thomas Hectus, a member of the Bar of this Court, hereby certify that three (3) copies of the Petition for Writ of Certiorari were mailed by first-class, postage prepaid, mail to:

Honorable Fred Cowan
Attorney General
Commonwealth of Kentucky
Capitol Building
Frankfort, KY 40601



C. THOMAS HECTUS
Counsel for Petitioner

DATED: May 8, 1989

RENDERED: July 29, 1988; 3:00 p.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NOS. 87-CA-1619-MR and 87-CA-1774-MR

TIMOTHY WASHABAUGH; and
NANCY WASHABAUGH — APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
V. HONORABLE CHARLES M. TACKETT, JUDGE
ACTION NOS. 87-CR-208-1 and 87-CR-208-2

COMMONWEALTH OF KENTUCKY — APPELLEE

AFFIRMING

* * * * * * *

BEFORE: GUDGEL, HAYES, and LESTER, Judges.

GUDGEL, JUDGE: This is an appeal from a judgment entered by the Fayette Circuit Court. Appellants were found guilty by a jury of the offense of knowingly receiving a stolen RCA camcorder. Appellants contend that the trial court erred (1) by failing to grant their motion to suppress the introduction into evidence of property allegedly seized as a

result of an unlawful search and seizure, (2) by denying their motions for a directed verdict, and their motion to define the term "reasonable doubt" for the jury, (3) by trying the case in accordance with the provisions of KRS 532.055, (4) by submitting an overlooked exhibit to the jury after it had begun its deliberations, (5) by permitting the commonwealth, during the sentencing phase of the trial, to prove appellants' previous misdemeanor convictions by the introduction of mere certified copies of the earlier judgments, and (6) by admitting certain prejudicial hearsay evidence. We disagree with all of appellants' contentions. Hence, we affirm.

Lexington Metro Police received information from managers of two video stores, located in Georgetown and Lexington, indicating that video tapes and video tape sleeves (cardboard display packages) were found to be missing after numerous occasions on which appellants came into those stores to

browse around. Appellants' identities were learned after the store managers provided police with a license plate number for their vehicle and then identified them from photographs.

Police initially obtained a search warrant for appellants' home. The affidavit supporting the warrant recites that the store managers actually witnessed appellants commit the thefts, but it was revealed at a subsequent suppression hearing that the actual thefts were not witnessed. The affidavit also included extensive information given to police by a private investigator, employed by the video stores, regarding incriminating telephone conversations which he had with appellant Timothy Washabaugh and the Washabaughs' young daughter. During the search of appellants' home police seized numerous video tapes, several of which were determined to be stolen, as well as video duplicating equipment and miscellaneous other items. Further, at the time of the search

police observed additional tapes in plain view in appellant's van. A second search warrant was then obtained for that vehicle and numerous additional video tapes were seized. In all, police confiscated over 1500 tapes.

The day after the news media ran a story concerning appellant's arrest and the search of their house, police were contacted by an employee of a third store. He indicated that appellants were present in his store on the day that an RCA camcorder was stolen, and that he suspected them of the theft. Armed with this new information and knowing that they had observed an RCA camcorder in appellants' home during their first search, police obtained a third search warrant. They again searched appellants' home and confirmed that the camcorder which they had earlier observed was indeed the one which was stolen from the third store.

At the conclusion of a suppression hearing the court denied appellants' motion to suppress the evidence seized during the three

police searches. At the conclusion of a subsequent trial, the jury convicted appellants of knowingly receiving the stolen RCA camcorder. Pursuant to the jury's recommendation, the court sentenced Timothy Washabaugh to four years imprisonment and Nancy Washabaugh to two years imprisonment. This appeal followed.

First, appellants contend that the court erred by failing to suppress the introduction into evidence of the stolen camcorder as being the fruit of an unlawful search and seizure. We disagree.

Probable cause justifying a search requires more evidence than a bare suspicion of criminal conduct, but less than that required to support a conviction. 8 L. Abramson, Kentucky Practice, §18.20 (2d ed. 1987). Cf. Massachusetts v. Upton, 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984). Sufficient probable cause exists when, at the time the search warrant issues, reasonably trustworthy facts and circumstances exist

which are sufficient, in view of the totality of the circumstances, to cause a reasonable person to believe that there is a fair probability that the search will reveal contraband or evidence of a crime. See Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); Beemer v. Commonwealth, Ky., 665 S.W.2d 912 (1984); Kentucky Practice, supra at §18.20. Moreover, although a search warrant may not be based upon probable cause established by false statements in a supporting affidavit where such statements were either deliberately or recklessly made, the warrant is not void if the remaining information in the affidavit is sufficient to establish probable cause. See Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); Robinson v. Commonwealth, Ky., 550 S.W.2d 496 (1977), cert. denied 434 U.S. 923, 98 S.Ct. 401, 54 L.Ed.2d 281 (1977).

Here, the supporting affidavit for the first search warrant incorrectly states that

video store employees actually witnessed appellants stealing video tapes and sleeves from two video stores, rather than such items were merely discovered to be missing after appellants visited the store. However, the affidavit also includes information given to policy by Jeffrey Clavell, a private investigator employed by the video stores. Accordingly to Clavell, he telephoned Timothy Washabaugh at home, identified himself as a former video store employee, and offered to sell Washabaugh some 2500 tapes which he had stolen from his former employer. Washabaugh expressed an interest in purchasing Clavell's stolen tapes, and further discussed with Clavell the illegal duplication of tapes for purposes of sales and rental. In addition, Washabaugh offered to purchase duplicating equipment form Clavell telephoned the Washabaughs' home again and spoke with their young daughter. She disclosed that four copies of a particular movie requested by Clavell were in her father's room. (Four

copies of this movie were stolen from a video store the day before, and appellants had been in the store that day.) She also stated that there were "thousands" of tapes in the house.

We have concluded that even though the affidavit supporting the first search warrant includes an inaccurate statement regarding the video store employees' actual witnessing of the thefts, the remaining allegations of the affidavit, in view of the totality of the circumstances, clearly establish sufficient probable cause to justify a magistrate's issuance of a search warrant. Appellants were present in two video stores on several occasions, immediately after which video tapes and sleeves were discovered to be missing, and the video store employees positively identified appellants as the persons suspected of the thefts. This information, coupled with Clavell's investigation and telephone conferences, in our opinion was clearly sufficient to establish probable cause to believe that a search of appellants' house

would produce stolen video tapes, sleeves and equipment. We are therefore not persuaded that the police conducted an illegal search and seizure when they executed the first search warrant.

Further, we reject appellants' argument that the first search warrant is overbroad and therefore invalid. Although it is true that the video stores provided the police with precise lists identifying the allegedly stolen tapes, Clavell's telephone conversations certainly provided a reliable independent basis for believing that numerous additional stolen tapes, besides those identified on the lists, might be found in appellants' home. Since there was probable cause to believe that additional stolen tapes besides those specifically reported and identified as missing from the video stores might be in appellants' home, and the names of those additional tapes were unavailable to police prior to the search, we conclude that the rule in Wilson v. Commonwealth, Ky., 621 S.W.2d 894

(1981), requiring items to be described as particularly as is possible in a search warrant, was not violated.

Given the lawfulness of the first search, the police clearly were authorized to open closets while searching for the items specified in the search warrant. See Estep v. Commonwealth, Ky., 663 S.W.2d 213 (1983). Thus, even if the first search warrant did not authorize the police to seize the RCA camcorder, the mere viewing of it by police during the first search was not illegal. Moreover, contrary to appellants' assertion, we conclude that the mere viewing of it did not constitute an illegal seizure of the camcorder, as there is no evidence that the equipment was moved from the closet, that its serial number was recorded, or that any other action was taken beyond the observation and handling of its incidental to the search for other items. Further, once the third party contacted the police to tell them of his suspicion that appellants had stolen an RCA

camcorder from his store, and specifically identified that item by model and serial numbers, probable cause existed to permit a reasonable person to believe that the stolen camcorder was indeed the one police had seen in appellants' home. See Gates, supra. Hence, we conclude that the court did not err by failing to grant appellants' suppression motion relating to the camcorder.

Next, appellants contend that the court erred by denying their motions for a directed verdict of acquittal, and by failing to define the term "reasonable doubt" for the jury. We disagree.

Appellants argue that the evidence adduced was insufficient to show that they knowingly possessed the stolen camcorder. However, KRS 514.110(2) specifically provides that mere possession of recently stolen property constitutes prima facie evidence that the possessor knew that the property was stolen. Further, although it is true that appellants adduced evidence that they

purchased the camcorder at a flea market, it nevertheless was not clearly unreasonable, under the evidence as a whole, for the jury to find them guilty of knowingly receiving stolen property. Hence, appellants were not entitled to a directed verdict. See Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983). In addition, the court clearly did not err by failing to give an instruction defining "reasonable doubt" for the jury, as RCr 9.56(2) specifically prohibits the court from giving such an instruction.

Next, appellants contend that the court erred by trying the case in accordance with the provisions of KRS 532.055. They argue that KRS 532.055(2)(b) violates the due process and equal protection clauses because it allows the commonwealth to adduce any evidence which is relevant to sentencing, but limits the defendant to rebuttal evidence or to evidence which demonstrates the absence of significant prior criminal activity. Further, they argue that the statute is infirm in that

it allows a jury to hear evidence concerning misdemeanors as part of the commonwealth's effort to prove the defendant's status as a persistent felon. We disagree.

KRS 532.055(2)(b) provides that after the commonwealth offers evidence relevant to sentencing, "[t]he defendant may introduce evidence in mitigation. For purposes of this section, mitigating evidence means evidence that the accused has no significant history of criminal activity which may qualify him for leniency. This section shall not preclude the introduction of evidence which negates any evidence introduced by the Commonwealth." Contrary to appellants' assertion, we are not persuaded that this provision violates constitutional protections, especially since it permits the defendant to adduce the same types of evidence which may be adduced by the commonwealth. Further, we will abstain from addressing the issue raised concerning evidence as to misdemeanors, since appellants were neither charged with nor tried as persistent felony offenders.

Next, appellants contend that the trial court erred by submitting a commonwealth's exhibit to the jury after it had begun its deliberations. However, it appears from the record that appellants did not object to the late submission until after the court had recalled the jurors, informed them of its inadvertent failure to earlier send the exhibit to the jury room, and sent them back for further deliberations. Appellants' objection, being untimely, was waived. See RCr 9.22. Moreover, even if the objection was not waived, we note that the exhibit in question consisted of the box in which the third store received the missing camcorder, and during the trial it was shown that a number on the box matched that on the stolen camcorder. Since appellants made no claim at trial that the camcorder they possessed was not the one taken from the store, but only that they had innocently purchased the camcorder at a flea market, we fail to see how appellants could have been prejudiced by the

jury's delayed receipt of the box. We find no error, therefore, in the failure to timely submit that exhibit to the jury.

Next, appellants contend that the court erred by allowing the commonwealth to adduce evidence concerning their recent Jefferson County misdemeanor convictions by means of the introduction of certified copies of the court's judgments in those cases. However, it is sufficient to note in response to this contention that since there was no dispute that the introduced copies were properly certified, the fact that they lacked judicial signatures is of no significance. Cf. Corbett v. Commonwealth, Ky., 717 S.W.2d 831 (1986).

Finally, appellants contend that the court erred by admitting prejudicial hearsay evidence as to an out-of-court conversation between an FBI agent and Timothy Washabaugh. We disagree.

During the conversation, Washabaugh first denied any knowledge about the camcorder, and then subsequently stated that

he had purchased it from a person whom he refused to identify as he did not wish to get anyone into trouble. Contrary to appellants' contentions, we conclude that Washabaugh's statements were admissible under the admissions against interest exception to the hearsay rule. See R. Lawson, The Kentucky Evidence Law Handbook, §8.10 (2d ed. 1984). The first statement clearly conflicts with Washabaugh's testimony and defense at trial that he innocently purchased the stolen camcorder at a flea market, while the second statement conflicts with that defense since it indicates that he might have been aware that the camcorder was stolen when he purchased it. Thus, we find no error in the court's admission of Washabaugh's statements.

The court's judgment is affirmed.

ALL CONCUR.

ATTORNEYS FOR APPELLANTS:

David C. Schwetschenau
1000 First Security Plaza
Lexington, Kentucky 40507

William E. Johnson
326 West Main Street
Frankfort, Kentucky 40601

ATTORNEYS FOR APPELLEE:

Frederic J. Cowan
Attorney General

Margaret M. Connolly
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601-3494

SUPREME COURT OF KENTUCKY

88-SC-769-D
87-CA-1619-MR and 87-CA-1774-MR

TIMOTHY WASHABAUGH; and
NANCY WASHABAUGH MOVANTS

V. FAYETTE CIRCUIT COURT
NOS. 87-CR-208-1 & 87-CR-208-2

COMMONWEALTH OF KENTUCKY RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion of the movants for a review of the decision of the Court of Appeals is denied.

ENTERED March 8, 1989.

/s/
Chief Justice

KENTUCKY RULES OF CRIMINAL PROCEDURE

RCr 9.56 Reasonable Doubt

(1) In every case the jury shall be instructed substantially as follows: "The law presumes a defendant innocent of a crime and the indictment shall not be considered as evidence or as having any weight against him. You shall find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty."

(2) The instructions should not attempt to define the term "reasonable doubt." (Amended June 18, 1976, effective July 1, 1976; amended June 8, 1978, effective July 1, 1978.)

KRS 514.110 Receiving stolen property

* * *

(2) The possession by any person of any recently stolen movable property shall be prima facie evidence that such person knew such property was stolen.